

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-5021

In The
United States Court of Appeals

For the Second Circuit

In The Matter of
Chili Heights Associates

Debtor

IN PROCEEDINGS FOR REAL PROPERTY
ARRANGEMENT UNDER CHAPTER XII

ON APPEAL FROM THE DECISION
AND ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF NEW YORK
BK-75-4635

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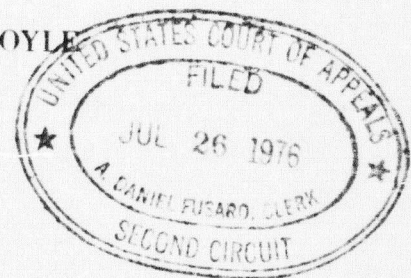
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STATEMENT OF THE CASE

Appellant Lincoln First Bank of Rochester ("Lincoln") seeks to reverse an Order Reversing an Order of Bankruptcy Judge, issued by United States District Court for the Western District of New York (Hon. Harold P. Burke), dated April 26, 1976 (All-13).¹

On November 10, 1975, the partnership of Chili Heights Associates, as BK-75-4018, filed a petition for an arrangement under Chapter XII of the Bankruptcy Act. Subsequently, said petition was dismissed without prejudice on December 12, 1975, on the grounds that one of the general partners, Anthony Audino, had refused to authorize said filing. On January 5, 1976, the partnership of Chili Heights Associates filed a new petition for an arrangement under Chapter XII of the Bankruptcy Act; and, the U.S. Bankruptcy Judge (Hon. Edward D. Hayes) issued an ex-parte Order Staying Suits (Al). This order enjoined and stayed, until final decree, all persons from commencing or continuing any suit, not only as against the debtor-partnership, but also as against "its nominee corporation, Chili Heights Apartments, Inc., including, without limitation, suits to enforce

1. Unless otherwise noted, references are to annexed Appendix to Brief.

liens upon the subject property and any suits involving guarantees by the individual partners pertaining thereto..."

Appellant bank holds an unsecured promissory note made by Chili Heights Apartments, Inc., and guaranteed, jointly and severally, by seven individuals. Six of the guarantors are partners of the Chapter XII debtor; none has filed a petition individually. No claim is made against Chili Heights Associates, the debtor in this Chapter XII case, and no lien is asserted against its property.

On January 5, 1976, the Appellant obtained an Order To Show Cause (A2-4), requesting that the earlier Order Staying Suits be vacated or annulled to the extent that it stayed or enjoined Lincoln from enforcing the indebtedness of Chili Heights Apartments, Inc., and the liability of its guarantors.

On January 29, 1976, following a hearing, the Bankruptcy Judge modified his earlier Order deleting all reference to the indebtedness of Chili Heights Apartments, Inc. and any guarantors thereof (A5-6).

On or about February 2, 1976, Lacy, Katzen, Greene & Jones, as attorneys for Jerome C. Rosenthal, Esq., Leonard Morris, Esq., Elizabeth Bauer, Joseph Fazio, Leonard Zaccaglino, and Frank Rizzo, filed a Notice of Appeal in said action. An Order granting a temporary stay was issued

by the United States District Judge (Harold P. Burke) (A7-10).

The Appeal from the order of the Bankruptcy Judge was heard by the district court on March 22, 1976. A decision was rendered on April 26, 1976. In its Order, the modified order of January 29, 1976 was reversed and the Order Staying Suits of January 5, 1976 was re-instated (All-13).

STATEMENT OF ISSUES

Whether the Bankruptcy Court had jurisdiction to enjoin in personam suits against the individual partners of a Chapter XII debtor on their personal, written guarantees of payment for the debts of a nominee corporation of the debtor.

Whether the Bankruptcy Court had jurisdiction to enjoin suits against Chili Heights Apartments, Inc., the nominee corporation of a partnership which had filed as a Chapter XII debtor.

In each case, the District Court held that such jurisdiction did exist.

ARGUMENT

- I THE BANKRUPTCY COURT LACKED JURISDICTION TO ENJOIN IN PERSONAM SUITS AGAINST THE INDIVIDUAL PARTNERS OF A CHAPTER XII DEBTOR ON THEIR PERSONAL WRITTEN GUARANTEES OF PAYMENT FOR THE DEBTS OF A NOMINEE CORPORATION OF THE DEBTOR.

Appellant bank holds an unsecured promissory note made by Chili Heights Apartments, Inc., and guaranteed, jointly and severally, by the seven individuals. No claim is made against Chili Heights Associates, a partnership, the debtor in this Chapter XII case, and no lien is asserted against its property. The stay order from which the bank seeks relief enjoins not only suits against the debtor, but also against its "nominee corporation", Chili Heights Apartments, Inc., and includes any suits involving guarantees. The issue raised is the authority to enjoin in personam suits against parties other than the debtor.

- A. ABSENT A SUIT AGAINST THE DEBTOR, OR AN ACTION TO ENFORCE A LIEN UPON PROPERTY OF THE DEBTOR, THERE IS NO AUTHORITY IN THE BANKRUPTCY ACT TO STAY IN PERSONAM SUITS AGAINST THIRD PARTIES.

The Judicial Code (28 U.S.C.A. § 2283) provides that:

"A Court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act

of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The express congressional authorization for such stays is, as far as this case is concerned, found in Sections 2a(15), 11a, 414, and 428 of the Bankruptcy Act, and in Rule 12-43 of the Chapter XII rules.

Section 11a provides:

"A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition by or against him, shall be stayed until an adjudication or the dismissal of the petition; ...

Sections 414 and 428 deal directly with a Chapter XII debtor:

Sec. 414. The court may, in addition to the relief provided by section 11 of this Act and elsewhere under this chapter, enjoin or stay until final decree the commencement or continuation of suits against a debtor and may, upon notice for cause shown, enjoin or stay until final decree any act or the commencement or continuation of any proceeding to enforce any lien upon any property of a debtor.

. . . .

Sec. 428. Unless and until otherwise ordered by the court, upon hearing and after notice to the debtor and all other parties in interest, the filing of a petition under this chapter shall operate as a stay of any act or proceeding to enforce any lien upon the real property or chattel real of a debtor.

Rule 12-43(a) supplements and reinforces the policy of §§ 414 and 428 by relieving the debtor of the

necessity to file an application for a stay. The "automatic stay" provides:

(a) Stay of Actions and Lien Enforcement. A petition filed under Rule 12-6 or 12-7 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property, or of any court proceeding for the purpose of the rehabilitation of the debtor or the liquidation of his estate.

Hence, Section 11a furnishes protection against suits on dischargeable claims which are pending at the time of the filing of the petition. Sections 414 and 428, which are supplemented and expanded by Rule 12-43, insulate the debtor not only from pending suits but also from the commencement of any court proceeding against him including any act or proceeding to enforce any lien against his property. These statutes are explicit in their application to the debtor and the debtor's property; they say nothing which would enlarge their coverage to include actions against persons who have not invoked the jurisdiction of the Bankruptcy Court by filing a petition. The Appellant makes no claim against the debtor or against the debtor's property. Its claim is against seven individuals, none of whom have filed a petition.

Section 411 of the Bankruptcy Act provides that the Chapter XII court shall have "exclusive jurisdiction of

the debtor and his property, wherever located." Section 2a(15) empowers a bankruptcy court to "(m)ake such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act" While this broad grant of power enables the bankruptcy court, upon acquiring jurisdiction of the debtor and his property, to restrain any state court proceeding which interferes with its custody of the debtor's property and the administration of his estate (1 Collier on Bankruptcy, 14th ed., ¶2.61(1)), it goes no further. If state court proceedings do not affect the debtor or the debtor's property, then there is no jurisdiction to interfere (Id. § 2.61(2)). See Gorovitz v. Balkin, 96 F. Supp. 747 (D. Mass. 1951); In re Magnus Harmonica Corporation, 233 F.2d 803 (Cir. 3d 1956); 237 F.2d 867, McGinnis Lumber Co. Inc. v. Belser, 385 F. Supp. 390 (D. So. C. 1974).

B. ENFORCEMENT OF IN PERSONAM
SUITS AGAINST INDIVIDUAL
PARTNERS WILL NOT BRING ABOUT
THE LIQUIDATION OF THE DEBTOR'S
PROPERTY OR ASSETS.

In a recently decided case, In Re Stanndco Developers, Inc., BANKR. L. REP. ¶65,955 this court stated that analogous language in Chapter X was intended "to allow

the Court to maintain the status quo of the debtor by restraining other proceeding which would impair the reorganization effort by bringing about the liquidation of the debtor's property or assets." (emphasis added) Id., at 75,718.

In re Stanndco held that the district court erred in refusing to modify its stay order to permit a creditor to proceed solely against the debtor's surety in a state court action.

The creditor had filed a mechanics' lien on real property owned by the Chapter X debtor. The debtor had effected a discharge of the lien by filing an undertaking conditioned for the payment of any judgment in any subsequent action brought by the creditor to enforce its lien.

This court initially observed:

It is well established that in order for a judicial proceeding to be subject to the injunctive authority of the Chapter X court it must have as its immediate objective a judgment against the debtor or interference with property of the debtor which is under the reorganization court's jurisdiction. Amoco Pipeline Co. v. Admiral Crude Oil Corp., 490 F.2d 114 (10th Cir. 1974); In re Beck Industries, Inc., 479 F.2d 410 (2d Cir.), cert. denied, 414 U.S. 858 (1973); In re Muntz TV Inc., 229 F.2d 314 (7th Cir., 1956); Warden v. Brady, 115 F.2d 89 (4th Cir., 1949); In re Hotel Martin Co. of Utica, 94 F.2d 643 (2d Cir., 1938); In re Prudence Co., Inc., 82 F.2d 755 (2d Cir.), cert. denied, 298 U.S. 685 (1936); In re Adolf Gobel, Inc., 80 F.2d 849 (2d Cir. 1936). The

district court in reorganization proceedings has no jurisdiction under the Act to restrain state court proceedings seeking to enforce liens on property not belonging to the debtor. In re Patten Paper Co., 86 F.2d 761, 765 (7th Cir. 1936); 6 Collier on Bankruptcy ¶3.32 at p. 657 (14th ed. 1972). Suits against persons concerning property which is not that of the debtor do not interfere with the reorganization of the debtor's estate and therefore are not enjoinable by the bankruptcy court. In re Muntz TV, Inc., supra at 316-17. "Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate." Callaway v. Benton, 336 U.S. 132, 142 (1949). Id. at 75,719

The court then examined the actual impact of the mechanics' lien foreclosure in light of the bond which had been substituted as security for the real property. The court determined, in accordance with New York law, that if the creditor obtained judgment, satisfaction would be by means of the undertaking. The suit would in no way affect the debtor's property. The court held that the state court action was one to establish the liability of the surety and to obtain a judgment in accordance with Section 16 of the Bankruptcy Act.

"The judgment is not against the person or property of the bankrupt, and has no other effect than to enable the plaintiff to charge the sureties, in accordance with the express terms of their contract, and with the spirit of that provision of the Bankrupt Act which declares that 'no discharge shall release, discharge or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety or otherwise.'" Hill v. Harding, supra at

703-04, citing predecessor to Section 16 of the Bankruptcy Act, 11 U.S.C. § 34. Id. at 75,720

The case at hand also involves sureties. The Appellant does not pray for relief to proceed against the debtor or the debtor's property, but seeks only to enforce the liability of a nominee corporation and its guarantors who are neither singly nor collectively within the protective jurisdiction of the bankruptcy court.

The Respondents argued below that if the stay order were to be lifted and judgments taken against the individual partners, these actions would have a serious impact on the partnership and its attempts to form an arrangement with its creditors. It was alleged that the rental income of the partnership's apartment complex would be attached, that the complex itself could be subject to forced sale, and that liens would be impressed on the partnership property.

Section 52 of the Partnership Law of New York (PL) provides "a partner's interest in the partnership is his share of the profits and surplus and the same is personal property." Hence, the rental income of the partnership, which is not even partnership profit, is not available to the creditors of partners. Furthermore, the Court attention is directed to PL § 54 which permits a creditor to seek a charging order against an individual share of profits or to

request the appointment of a receiver of said individual share of the profits. Such a charging order, or the appointment of a receiver, would clearly be subject to the existing legal and financial condition of the partnership. Such an action would not interfere in partnership affairs.

As to the danger of liquidation, under PL § 51(c), "a partner's right in specific partnership property is not subject to attachment or execution..." No forced sale could result.

Thirdly, under PL § 52 and CPLR § 5203(a), it is clear that no lien on the partnership property would be caused by an individual judgment. A judgment against an individual partner to enforce a separate liability as guarantor would not constitute a lien against the real property of the partnership, because the partnership is not the judgment debtor (CPLR § 5203(a)), and, because the partner's interest in the partnership is personal property (PL § 52) and not subject to execution (PL § 51(c)).

Hence, as in Stanndco, an in personam suit against individual partners as sureties does not "have as its immediate objective a judgment against the debtor or interference with property of the debtor which is under the (reorganization) court's jurisdiction." Id. at 75,719.

The suit at issue is not one "leading to the divestiture of the debtor's title". In re Thomas J. Grosso Investment, Inc., 457 F.2d 168, 172 (9th Cir. 1972). The purpose of Appellant's suit would be to establish the liability of each partner as surety, and to obtain a judgment solely as against each individual. Such individual judgments, if obtained, will not bring about the liquidation of the debtor's property or assets.

II THE DEBTOR'S "NOMINEE CORPORATION" IS OUTSIDE THE JURISDICTION OF THE CHAPTER XII CASE.

Whatever the relationship between the debtor-partnership, Chili Heights Associates, and its "nominee corporation," Chili Heights Apartments, Inc., may be, whether contractual or stock ownership, the jurisdiction of the Chapter XII court over the partnership does not result in jurisdiction over the corporation.

A. A CORPORATION IS NOT QUALIFIED FOR RELIEF UNDER CHAPTER XII

Bankruptcy Act § 406(6) provides that:

"Debtor" shall mean a person other than a corporation as defined in this Act, who could become a bankrupt under § 4 of this Act, who files a petition under this Chapter and who is the legal or equitable owner of real property or a chattel real which is security for any debt, but shall not include a person

whose only interest in property proposed to be dealt with by the arrangement is a right to redeem such property from a sale had before the filing of such petition.

Chili Heights Apartments, Inc., as a corporation, is outside the jurisdiction of the Chapter XII case.

B. MERE FINANCIAL INTEREST OF A DEBTOR IN THE OUTCOME OF LITIGATION PENDING IN STATE COURT DOES NOT AUTHORIZE THE ISSUANCE OF AN INJUNCTION AGAINST SUCH PROSECUTION.

The nominee corporation herein remains a separate entity; its assets and liabilities are not the assets and liabilities being administered in the partnership real property arrangement; and the financial consequences to the partnership from litigation involving the corporation is not a jurisdictional basis for injunctive relief (In re Unishops, Inc., 494 F.2d 689, (C.A. 2d, 1974); In re Beck Industries, Inc., 479 F.2d 410 (C.A. 2d, 1973); In re Adolf Gobel, Inc., 80 F.2d 849 (C.C.A. 2d 1936)). An assumption by the partnerships of all the liabilities of the corporation would not change the latter's status as a separate entity (In re Unishops, Inc., supra).

It has long been the general rule that a reorganization court has no power to enjoin actions commenced against a debtor's solvent and wholly independent subsidiary. This is based on the reasoning that Congress did

not intend the bankruptcy court to have exclusive jurisdiction over "all controversies that in some way affect the debtor's estate." Callaway v. Benton, 336 U.S. 132, 142 (1949). See In re Beck Industries, *supra*, at 415; In re South Jersey Land Corp. (3rd Cir., 1966) 361 F.2d 610, Tonkawa Refining Co., 502 F.2d 1341 (10th Cir. 1974), Parkview-Gem Inc. v. Stein, 516 F.2d 807 (8th Cir. 1975).

It is submitted to this court that the rule applied to a Chapter X reorganization court is also applicable, by analogy, to a Chapter XII real property arrangement court. Just as parent and subsidiary corporations remain distinct entities, so the partnership-debtor is separate from its "nominee corporation." Even if all the officers of Chili Heights Apartments, Inc. are also partners in the debtor, the corporate assets and liabilities are not the property and debts of the debtor. Even if all the corporate stock is held by individual partners, or by the debtor itself, the possible decrease in value of this stock is not jurisdictional basis for injunctive relief.

C. NEITHER THE DEBTOR, NOR THE
INDIVIDUAL PARTNERS, MET THEIR
BURDEN OF PROOF IN SHOWING THAT
THE NOMINEE CORPORATION WAS A
MERE SHAM.

If the debtor wishes to be outside the "general rule ... established as the law of this Circuit in the lead-

ing case of In Re Gobel, Inc......" it must prove that the "(s)ubsidiary was a mere sham or conduit rather than a viable entity..." In re Beck Industries, supra, at 415, 416. Where the debtor seeks to pierce its own veil, the burden of proof is on the debtor.

As this court observed in Beck:

"Where a parent corporation desires the legal benefits to be derived from organization of a subsidiary that will function separately and autonomously in the conduct of its own distinct business, the parent must accept the legal consequences the parent cannot "have it both ways." Id. at 418.

Neither at the hearing held on January 15, 1976 (A2-4), nor at any later time, has the Respondent offered any proof that Chili Heights Associates, Inc. was a mere sham or conduit rather than a viable entity. It is to be assumed that the general rule of a valid entity applies.

III EVEN IF THE PARTNERSHIP-DEBTOR AND ITS NOMINEE CORPORATION ARE TREATED AS A SINGLE ENTITY, THE LIABILITY OF THE PARTNER-GUARANTORS IS NOT AFFECTED BY THE CHAPTER XII CASE.

Respondent will represent to this Court that there is an identity of interest between the partnership and the corporation, Chili Heights Apartments, Inc., and urge this Court in the exercise of broad equitable powers to bring the nominee corporation within the provisions of the stay provided for by Rule 12-43.

The guarantors are not entitled to the protection of a stay although some or all of them may be partners in Chili Heights Associates. Section 5j (11 U.S.C. § 23) provides that "(t)he discharge of a partnership shall not discharge the individual general partners thereof from the partnership debts." Even if Chili Heights Associates was the obligor of the bank, and no claim is made that it is, its discharge upon confirmation of an arrangement in Chapter XII would not discharge the individual general partners from the partnership debts.

Section 16 (11 U.S.C. § 34) states that "(t)he liability of a person who is a co-debtor with or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt." Again assuming that the indebtedness due the bank is in fact owed by the partnership, then the written guarantees of payment made by partners constitute distinct and separate liabilities of the individual partners and as such would not be altered by the discharge of the partnership. Neither as partners, nor as guarantors, can the individual respondents claim immunity from suit.

CONCLUSION

For the foregoing reasons, Appellant Lincoln First Bank of Rochester respectfully submits that the decision of

the Court below reversing the modified order and re-instating the earlier Order Stay Suits was in error. The order of the district court should be reversed, and the Modified Order of the Bankruptcy Judge, dated January 29, 1976, be affirmed and re-instated.

Dated: July 21, 1976

Respectfully submitted,

NIXON, HARGRAVE, DEVANS & DOYLE

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APPENDIX

Order Staying Suits, issued by Bankruptcy Judge, dated January 5, 1976	A-1
Order to Show Cause issued by Bankruptcy Judge, dated January 5, 1976 (including annexed Petition in Support of Application to Vacate Order Staying Suits)	A-2
Modified Order Staying Suits, issued by Bankruptcy Judge, dated January 29, 1976	A-5
Order Granting Temporary Stay, issued by United States District Judge, dated February 5, 1976 (including annexed application of individual partners) ...	A-7
Order Reversing an Order of Bankruptcy Judge, issued by United States District Judge, dated April 26, 1976 .	A-11

A-1

Order Staying Suits

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In the Matter of : IN PROCEEDINGS FOR REAL ESTATE
CHILI HEIGHTS ASSOCIATES, : ARRANGEMENT UNDER CHAPTER 12
Debtor. : OF NATIONAL BANKRUPTCY ACT.
: BK-75-4635
:

ORDER STAYING SUITS

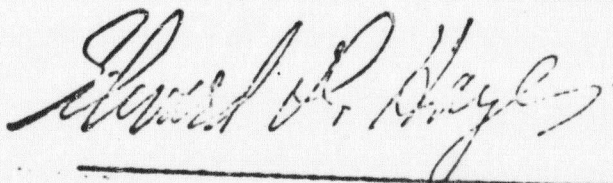
AT ROCHESTER, NEW YORK, IN THE SAID DISTRICT, ON THE 5 DAY OF
JANUARY, 1976.

Upon the annexed Petition of Chili Heights Associates, the above-named debtor, praying for a stay of suits against it; and it appearing that no notice of a hearing thereon should be given; and no adverse interest having been represented; and it further appearing that the rights of creditors will not be prejudiced by requiring an adjudication of their claims on the merits in this Court, it is

ORDERED, that all persons be, and they hereby are enjoined and stayed until final decree herein from commencing or continuing any suit against Chili Heights Associates, the above-named debtor, its nominee corporation, Chili Heights Apartments, Inc., including, without limitation, suits to enforce liens upon the subject property and any suits involving guarantees by the individual partners pertaining thereto; it is

ORDERED that service by mail of this ORDER shall be deemed sufficient.

DATED: January 5, 1976



U. S. Bankruptcy Judge

Order to Show Cause

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK

In the Matter of

CHILI HEIGHTS ASSOCIATES,

ORDER TO SHOW CAUSE

Debtor.

At Rochester in said District,

Upon the petition of Lincoln First Bank of Rochester,
dated the 5th day of January, 1976:

Let Chili Heights Associates show cause before this Court
at the United States Court House, City of Rochester, on the 15th
day of January, 1976, at 10 o'clock in the forenoon of that day or
as soon thereafter as counsel can be heard, why an order should not
be entered herein vacating and annulling the stay order of this
court dated January 5th, 1976, to the extent that
such order stays or enjoins petitioner from enforcing the indebted-
ness of Chili Heights Apartments, Inc., and the liability of its
guarantors, and why the moving party should not have such other and
further relief as may be just, proper and equitable.

Sufficient reason appearing therefor, by service of a
copy of this order together with a petition upon which it was
granted, upon Salamone, Kurlander & Alois as attorneys for Chili
Heights Associates, on or before the 5th day of January, 1976,
be deemed good and sufficient service.

Dated: January 5, 1976

/s/ Edward J. Hayes
Bankruptcy Judge

Order to Show Cause

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK

In the Matter of

CHILI HEIGHTS ASSOCIATES,

Debtor.

IN PROCEEDINGS FOR
REAL PROPERTY ARRANGEMENT
UNDER CHAPTER XII.

BK-75-4018

PETITION IN SUPPORT OF APPLICATION
TO VACATE ORDER STAYING SUITS

To: Hon. Edward D. Hayes, Bankruptcy Judge.

The petition of Lincoln First Bank of Rochester respectfully shows that:

1. Petitioner is a New York banking corporation and its post office address is Lincoln First Square, Rochester, New York 14643.

2. By an order of this Court, dated January 5, 1986, petitioner was enjoined and stayed from commencing or continuing any suit against the above-named debtor or its "nominee corporation, Chili Heights Apartments, Inc., including, without limitation, suits to enforce liens upon the subject property and any suits involving guarantees pertaining thereto." ~~A copy of said order is attached hereto and marked Exhibit "A".~~

3. Petitioner was not at the time of the filing of the petition commencing this case, and is not now, a creditor of Chili Heights Associates, the debtor herein, and does not have or purport to have any claim or claims of any kind whatsoever against said debtor.

4. Petitioner does not hold any debt secured by real property or a chattel real of which the debtor is the legal or equitable owner.

5. Petitioner is the owner and holder of an unsecured

Order to Show Cause

promissory note made by Chili Heights Apartments, Inc., a New York corporation on July 8, 1975 for \$25,000 payable September 8, 1975, with interest, no part of which has been paid.

6. Payment of said corporate promissory note is jointly and severally guaranteed in writing by Frank, Rizzo, Joseph Fazio, Jerome C. Rosenthal, Leonard Morris, Elizabeth J. Bauer, Leonard Zaccaglino, and Anthony Audino; jointly and severally, unconditionally guaranteed in writing to petitioner payment of the indebtedness of Chili Heights Apartments, Inc.

7. A summons with verified complaint has been issued by your petitioner's attorneys against Chili Heights Apartments, Inc., and the aforesaid guarantors to recover a money judgment on said note and guarantees, and some, but not all, of the defendants have been served.

WHEREFORE, your petitioner prays for an order vacating and annulling the stay order of this court, dated November 18, 1975 to the extent that such order stays or enjoins petitioner from enforcing the indebtedness of Chili Heights Apartments, Inc., and the liability of its guarantors.

LINCOLN FIRST BANK OF ROCHESTER,
Petitioner.

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Modified Order Staying Suits

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK

In the Matter of
CHILI HEIGHTS ASSOCIATES,
Debtor.

IN PROCEEDINGS FOR
REAL PROPERTY ARRANGEMENT
UNDER CHAPTER XII

BK-75-4018

MODIFIED ORDER STAYING SUITS

AT ROCHESTER, NEW YORK, IN THE SAID DISTRICT,

Upon the Petition of Lincoln First Bank of Rochester, dated the 5th day of January, 1976, and upon the petition of Citibank (New York State) N.A., formerly Citibank (Mid-Western) N.A., and upon the petition of Security Trust Co., and upon an Order to Show Cause returnable on the 15th day of January, 1976, and notice of said hearing having been given as prescribed by this Court in its Order dated January 5, 1976, and after hearing Nixon, Hargrave, Devans & Doyle, attorneys for Lincoln First Bank of Rochester and Harris, Beach & Wilcox, attorneys for Security Trust Co. and Goldstein, Goldman, Kessler & Underberg, attorneys for Citibank, in favor of said Petitions, and Salamone & Alois, attorneys for the debtor, Lacy, Katzen, Greene & Jones, attorneys for individual partners Frank Rizzo, Jerome C. Rosenthal, and Leonard Morris, appearing in opposition thereto.

NOW, upon all the proceedings had before me at the said hearing, it is,

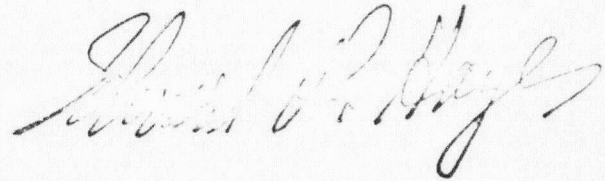
Modified Order Staying Suits

ORDERED that an earlier Order of this Court be modified to read as follows:

ORDERED that all persons be, and they hereby are enjoined and stayed until final decree herein from commencing or continuing any suit against Chili Heights Associates, the above-named debtor,

ORDERED that service by mail of this Order shall be deemed sufficient.

Dated: January 29, 1976

A handwritten signature in cursive script, appearing to read "Edward D. Hayes", written in dark ink.

Edward D. Hayes
U. S. Bankruptcy Judge

Order Granting Temporary Stay

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In the Matter of
CHILI HEIGHTS ASSOCIATES,

Debtor.

IN PROCEEDINGS FOR REAL
PROPERTY ARRANGEMENT UNDER
CHAPTER XIII

ORDER GRANTING TEMPORARY STAY

Upon the annexed application of the individual partners of the above named debtor dated February 4, 1976 and upon the petition for reorganization under Chapter XII of the Bankruptcy Act heretofore filed herein, and sufficient cause appearing therefor, it is

ORDERED, that the Order Staying Suits dated January 5, 1976 of Hon. Edward D. Hayes is hereby continued and the same is declared to be in full force and effect until the appeal of the January 29, 1976 order of Hon. Edward D. Hayes modifying said January 5, 1976 order is heard and determined and it is further,

ORDERED, that all persons be and they hereby are stayed and enjoined from commencing or continuing any suit against JEROME C. ROSENTHAL, ESQ., LEONARD MORRIS, ESQ., ELIZABETH BAUER, JOSEPH FAZIC, LEONARD ZACCAGLINO, FRANK RIZZO until the aforesaid appeal is determined.

Dated: 2/5/76


United States District Judge

Order Granting Temporary Stay

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In the Matter of

CHILI HEIGHTS ASSOCIATES,

Debtor.

IN PROCEEDINGS FOR REAL
PROPERTY ARRANGEMENT UNDER
CHAPTER XIII

APPLICATION FOR TEMPORARY
STAY

TO: HON. HAROLD P. BURKE, UNITED STATES DISTRICT JUDGE:

The application of JEROME C. ROSENTHAL, ESQ., LEONARD MORRIS, ESQ., ELIZABETH BAUER, JOSEPH FAZIO, LEONARD ZACCAGLINO, and FRANK RIZZO by LOUIS A. RYEN, ESQ., their attorney, respectfully represents:

1. That on the 29th day of January 1976, Bankruptcy Judge, Edward D. Hayes rendered a memorandum decision modifying a prior order of his dated January 5, 1976 (copy attached) thereby exposing the above named applicants to law suits for collection of the loans to the above named debtor guaranteed by them.

2. The applicants have on February 3, 1976 filed with the Bankruptcy Court their "Notice of Appeal" (copy attached) of the above mentioned memorandum decision.

3. In the event such law suits are started and/or continued against the applicants and judgments obtained, their ability to bring about the reorganization of the debtor will be totally frustrated and irreparably damaged.

4. There are several law suits already commenced against the applicants which have been held in abeyance during the pendency of the January 5, 1976 Stay Order.

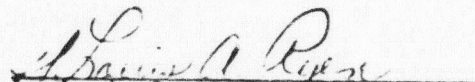
Order Granting Temporary Stay

5. The applicants request this Court to continue the said Order Staying Suits dated January 5, 1976 until the appeal of Judge Hayes' order dated January 29, 1976 is determined.

6. That said Louis A. Ryen, did on February 3, 1976 ask Hon. Edward D. Hayes if he would sign an order continuing his Stay Order dated January 5, 1976 until the appeal was heard and determined and he advised that he would not grant such a continuance.

WHEREFORE, the applicants pray that the order of Judge Hayes dated January 5, 1976 staying suits be continued and that all suits and proceedings against them be temporarily stayed and enjoined until the appeal of Judge Hayes' order of January 29, 1976 modifying the stay is determined.

Dated: February 4, 1976


Louis A. Ryen, Esq. for
LACY, KATZEN, GREENE & JONES
Attorneys for
JEROME C. ROSENTHAL, ESQ.,
LEONARD MORRIS, ESQ.
ELIZABETH BAUER,
JOSEPH FACIO,
LEONARD ZACCAGLINO,
FRANK RIZZO,
Office & P.O. Address:
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Order Granting Temporary Stay

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In the Matter of

CHILI HEIGHTS ASSOCIATES,

Debtor.

IN PROCEEDINGS FOR REAL
PROPERTY ARRANGEMENT UNDER
CHAPTER XIII

NOTICE OF APPEAL

PLEASE TAKE NOTICE that FRANK RIZZO, JEROME C. ROSENTHAL, ESQ., LEONARD MORRIS, ESQ., ELIZABETH BAUER, JOSEPH FAZIO, and LEONARD ZACCAGLINO, hereby appeal to the United States District Court of New York from the memorandum decision and order of Hon. EDWARD D. HAYES, Bankruptcy Judge, dated the 29th day of January, 1976, which memorandum decision and order modified an earlier order of the Court staying suits against the debtor herein, the individual partners of the debtor herein and Chili Heights Apartments, Inc., and further appeal from each and every part of said memorandum decision and order as well as from the whole thereof.

Dated February 2, 1976



Louis A. Ryen, Esq.,
for LACY, KATZEN, GREENE & JONES
Attorneys for
JEROME C. ROSENTHAL, ESQ.,
LEONARD MORRIS, ESQ.,
ELIZABETH BAUER,
JOSEPH FAZIO,
LEONARD ZACCAGLINO,
FRANK RIZZO,

Office & P. O. Address:
228 Plymouth Avenue South
Rochester, New York 14608
Telephone: 716-454-5650

TO: HON. EDWARD D. HAYES
Bankruptcy Judge
U. S. Court House
100 State Street
Rochester, N. Y.

Donald A. Salamone, Esq.
Salamone & Aloï
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John C. Ninfo II, Esq.
Goldstein, Goldman Attorneys
Lincoln First Tower
Rochester, N.Y. 14603

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Order Reversing an Order of Bankruptcy Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In the Matter

of

CHILI HEIGHTS ASSOCIATES,

Debtor

DK-75-4635

PROCEEDING UNDER

CHAPTER XII

Louis A. Ryan
228 Plymouth Avenue South
Rochester, N.Y. 14603
Attorney for Jerome C. Rosenthal, Leonard Morris,
Elizabeth Bauer, Joseph F. Fazio, Leonard
Zaccaglino and Frank Rizzo

Harris, Beach & Wilcox
2 State Street
Rochester, N.Y. 14614
Attorneys for Security Trust Company

Goldstein, Goldman, Kessler & Underberg
1805 Lincoln First Tower
Rochester, N.Y. 14604
Attorneys for Citibank

Salamone & Aloï
36 West Main Street
Rochester, N.Y. 14614
Attorneys for Chili Heights Associates

Woods, Oviatt, Gilman, Sturman & Clarke
45 Exchange Street
Rochester, N.Y. 14614
Attorneys for Central Trust Company

Martin Bornstein
2912 Delaware Avenue
Kenmore, N.Y. 14217
Attorney for individual partners of
Chili Heights Associates

Order Reversing an Order of Bankruptcy Judge

This is an appeal by Frank Rizzo, Jerome C. Rosenthal, Leonard Morris, Elizabeth Bauer, Joseph Fazio, and Leonard Vaccaglino, partners of the debtor who guaranteed the loans of Chili Heights Apartments, Inc., from an order of the Bankruptcy Judge dated January 29, 1976 modifying his earlier order of January 5, 1976. The order appealed from ordered that the January 5, 1976 order be modified to read "ORDERED that all persons be, and they hereby are, enjoined and stayed until final decree herein from commencing or continuing any suit against Chili Heights Associates, the above named debtor." The earlier order of the Bankruptcy judge dated January 5, 1976 ordered that all persons be enjoined until final decree from commencing or continuing any suit against Chili Heights Associates, the debtor, its nominee corporation, Chili Heights Apartments, Inc., including, without limitations, suits to enforce liens upon the subject property and any suits involving guarantees by the individual partners pertaining thereto.

In a Chapter XII proceeding the court has the authority to take measures to assure the debtor a fair chance to achieve a workable arrangement, *Colonial Realty Investment Co. vs. Martin*, 516 F. 2d. 154 (1 cir. 1975). To allow unsecured creditors to proceed with suits against Chili Heights Apartments, Inc., and guarantors, would frustrate the power of the court to achieve a workable arrangement.

BEST COPY AVAILABLE

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Order Reversing an Order of Bankruptcy Judge

The modified order of January 29, 1976 appealed
from is reversed. The order of January 5, 1976 is re-instated.

IT IS HEREBY SO ORDERED.

H. P. Burke

HAROLD P. BURKE
United States District Judge

April 26 1976.

Affidavit of Service

Monroe County's
Business/Legal Daily Newspaper
Established 1908

11 Centre Park
Rochester, New York 14608
Correspondence P.O. Box 6, 14601
(716) 232-6920

Johnson D. Hay / Publisher
Russell D. Hay / Board Chairman

The Daily Record

July 23, 1976

Re: In the Matter of Chili Heights Associates In Proceedings for
Real Property Arrangement under Chapter XII

State of New York)
County of Monroe) ss.:
City of Rochester)

Ann M. Updaw

Being duly sworn, deposes and says: That he is associated with The Daily Record
Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of
Nixon, Hargrave, Devans and Doyle

Attorney(s) for
Appellant

On July 23, 1976

(s)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix
of the above entitled case addressed to:

MORTON BORNSTEIN, ESQ.
2913 Delaware Ave
Kenmore, NY 14217

☒ By depositing true copies of the same securely wrapped in a postpaid wrapper in a
Post Office maintained by the United States Government in the City of Rochester, New York.

☐ By hand delivery

Ann M. Updaw

Sworn to before me this 23rd day of July 1976

John D. Hay
Notary Public
Commissioner of Deeds